Office-Supreme Court, U.S.
FILED
DEC 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-204

In the Supreme Court of the United States

OCTOBER TERM, 1983

RONALD JARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his claim of selective prosecution by failing to raise the issue prior to trial as required by Fed. R. Crim. P. 12(b).

2. Whether petitioner established a prima facie case of selective prosecution that would entitle him to a hearing.

3. Whether petitioner was denied effective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 705 F.2d 198.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983. A petition for rehearing (Pet. App. 21) was denied on June 8, 1983. The petition for a writ of certiorari was filed on August 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of obstructing, delaying, and affecting commerce by means of robbery, in violation of 18 U.S.C. 1951. He was adjudged a

dangerous special offender (18 U.S.C. 3575), and sentenced to 25 years' imprisonment (Pet. App. 22-23). The court of appeals affirmed (Pet. App. 1-20).

1. The evidence at trial showed that petitioner planned the armed robbery of a jewelry store, assisted by Joseph Rodriquez, David Willis, and Ronald Brown (Tr. 164, 247).[1] After petitioner supplied loaded guns, walkie-talkies, and a police scanner for use in the robbery, the four men drove to the Orange Blossom Jewelry Store in Oak Lawn, Illinois (Tr. 102-105, 145-151, 220-222, 227-231). There, Brown and Willis were instructed to enter the store and remove everything from the safe, while petitioner and Rodriquez remained outside as lookouts (Tr. 233, 247-248). According to plan, Brown and Willis entered the store, held the employees at gun point, and took cash and jewelry from the safe and display window (Tr. 153-157, 237). When petitioner signalled them by walkie-talkie (Tr. 238), Brown and Willis left the store with $39,000 in merchandise and cash (Tr. 41, 158, 239-240). Testimony of the store owner showed that the robbery had a significant effect on interstate commerce (Tr. 20, 43-46; GX 12A, 13, 14, 15, 15, 26A, 26B, 26C).

2. Two months after trial petitioner moved for a judgment of acquittal based on vindictive and selective prosecution (Pet. App. 10). Petitioner alleged that he had been unfairly singled out for prosecution to punish him for exercising his Fifth Amendment privilege against self-incrimination when he was called before the grand jury in April 1979 to testify about an unrelated robbery (Pet. 4).

In response to petitioner's post-trial motion, the government submitted the affidavits of five federal agents. According to these affidavits the investigation of petitioner began

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[1] Willis and Brown testified for the government at trial.

in late 1977, after the $700,000 burglary of another Chicago jewelry store and the subsequent murder of the prime suspect, an associate of petitioner's (R. 61, at 2-3). In April 1979, petitioner was subpoenaed to testify before the grand jury investigating these crimes, but declined to do so on Fifth Amendment grounds. Two months later federal agents obtained information linking petitioner to the murder of Joseph Rodriquez and to the burglary of the Orange Blossom Jewelry Store (R. 61, at 5-6). An investigation was then begun into the armed robbery and the murder (R. 61, at 6). That investigation continued for approximately 18 months; during that time the agents learned more about petitioner's other criminal activities from his associates (R. 61, at 6-7). In October 1980, the investigation was completed, and petitioner was indicted on this charge.

The district court thereafter denied petitioner's motion, ruling that he had waived his vindictive and selective prosecution claims by failing to assert them prior to trial (Pet. App. 10).[2]

ARGUMENT

Petitioner contends (Pet. 12-25) that he has established a prima facie case of vindictive[3] and selective prosecution,

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[2]Petitioner concedes that he did not file a motion for relief on the basis of selective or vindictive prosecution before trial (Pet. 6-7). The first reference to such a motion came on the second day of the three-day trial when petitioner's counsel mentioned to the court that he intended to file one (Tr. 75-76).

[3]As the court of appeals noted (Pet. App. 8 n.8):

> Although Jarrett also claims vindictive prosecution, this claim fails since vindictive prosecution has as its basis an increase in charges or a new prosecution allegedly brought in retaliation for the exercise of constitutional rights. Here there is a single prosecution, and no increase in charges. Jarrett apparently wishes to equate his appearance as a witness before the 1978 grand jury with a criminal proceeding against him personally. This, however, is

and that such a claim need not be raised prior to trial under Fed. R. Crim. P. 12(b). He also argues that if this defense was lost by not being timely presented, he received ineffective assistance of counsel. These claims are without merit.

1. The district court and the court of appeals correctly concluded that petitioner waived his selective prosecution claim by failing to raise it prior to trial. Fed. R. Crim. P. 12(b)(1) states that claims based on "defects in the institution of the prosecution" must be raised before trial. The failure to raise such claims prior to trial "shall constitute waiver thereof." Fed. R. Crim. P. 12(f). Courts that have considered the matter have concluded that a claim of selective prosecution must be raised before trial, and that the failure to do so waives the claim (Pet. App. 9-11). See *United States* v. *Taylor*, 562 F.2d 1345, 1352 (2d Cir.), cert. denied, 432 U.S. 909 (1977); *United States* v. *Radetsky*, 535 F.2d 556, 571 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Oaks*, 508 F.2d 1403, 1404 (9th Cir. 1974); *United States* v. *Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973).

Petitioner cites no contrary authority. Instead he argues (Pet. 19) that selective prosecution is not a defense "based on defects in the institution of the prosecution" (Fed. R. Crim. P. 12(b)(1)), but is rather, like double jeopardy, a defense that may be asserted either before or at trial. But it is evident that a claim of selective prosecution is in fact more akin to claims of police misconduct in obtaining evidence

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not the type of situation that falls within the perimeters of a vindictive prosecution defense. *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *United States* v. *Wilson*, 639 F.2d 500 (9th Cir. 1981).

Petitioner in fact concedes (Pet. 15) that the court of appeals was "technically correct" and in accordance with "prevailing views" in finding that his claim was really one of selective, rather than vindictive, prosecution.

(Fed. R. Crim. P. 12(b)(3); *United States* v. *Johnson*, 614 F.2d 622 (8th Cir. 1980)), and claims of prosecutorial misconduct before the grand jury (Fed. R. Crim. P. 12(b)(1); *United States* v. *Johnson*, 679 F.2d 54 (5th Cir. 1982) (vindictive prosecution); *Soper* v. *United States*, 220 F.2d 158 (9th Cir.), cert. denied, 350 U.S. 828 (1955) (prosecutorial prejudice)), which are waived if not raised before trial. See also *United States* v. *Wilson*, 639 F.2d 500, 505-506 (9th Cir. 1981). The purpose underlying the requirement in Rule 12(b)(3), for example — equally applicable in the case of selective prosecution motions — is "to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt." Fed. R. Crim. P. 12(b)(3), advisory committee note at 44 (1974 amend.) (emphasis omitted). Moreover, the failure of the defendant to raise even a meritorious claim of selective prosecution until after trial results in the conduct of an unnecessary trial — a waste of the public's resources that should not be tolerated without some showing of justification.

It is true that the issue of double jeopardy is also collateral to the general issue of guilt or innocence. But unlike petitioner's more general claim of unfair treatment, the defense of double jeopardy rests on a specific constitutional guarantee (U.S. Const. Amend. V) for which this Court has shown a unique solicitude both at the trial level and on appeal. Compare *Abney* v. *United States*, 431 U.S. 651 (1977) (right to interlocutory appeal from order denying motion to dismiss on double jeopardy grounds), with *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (no right to interlocutory appeal from order denying motion to dismiss on vindictive prosecution grounds).

Petitioner also cites several oblique references during and after trial to the issue of selective prosecution (Pet. 22-23), and asserts that the district court's comments on those occasions amount to a decision that he is entitled to relief

from waiver under Fed. R. Crim. P. 12(f). Petitioner acknowledges, as he must, that at best the issue was "first raised * * * during trial" (Pet. 22), rather than in advance as required by Rule 12(b)(1). And he offers nothing more than his own unsupported allegations about the waywardness of his counsel by way of explanation for his failure to make a timely motion (Pet. 6-7). But as the court of appeals noted (Pet. App. 10-11), and as petitioner seems to concede (Pet. 6 n. 1), there was no showing made to the district court of the requisite "cause [for] * * * grant[ing] relief from the waiver." Fed. R. Crim. P. 12(f). Under these circumstances the hypothesis that the district court granted such relief — a supposition contradicted by that court's explicit denial of the selective prosecution claim on July 30, 1981 (Pet. 10) —is without merit.

2. Even if petitioner had not waived his claim of selective prosecution, it is clear that he failed to establish even a prima facie case entitling him to a hearing on that issue. In order to be entitled to a hearing on a claim of selective prosecution a defendant must show: (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's decision to prosecute him was based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights (Pet. App. 9). *United States* v. *Heilman*, 614 F.2d 1133, 1138-1139 (7th Cir.), cert. denied, 447 U.S. 922 (1980); *United States* v. *Torquato*, 602 F.2d 564, 570 (3d Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Absent such a showing, the presumption that a criminal prosecution is undertaken in good faith and in a nondiscriminatory manner remains undisturbed. *United States* v. *Niemiec*, 611 F.2d 1207, 1209 (7th Cir. 1980).

Petitioner characterizes his robbery prosecution under the Hobbs Act as very unusual, since "virtually hundreds of local robberies never give rise to Hobbs Act prosecutions" (Pet. 13, 17). While it is true that the federal government does not prosecute every robbery affecting interstate commerce, petitioner has neither alleged nor shown that it is unusual for the federal government to do so in the case of a career criminal (Pet. App. 18) who has committed a serious armed robbery involving a large sum of money.

Petitioner also fails to substantiate his assertion that the government chose to prosecute him for exercising his Fifth Amendment privilege when he appeared before the grand jury. Petitioner concedes that the government did not obtain the evidence linking him to the Orange Blossom robbery until at least the fall of 1979, six months after his appearance before the grand jury (Pet. 4-5). Petitioner was not indicted until a year later. To be sure, petitioner was indicted by the same grand jury before which he had refused to testify. But if the conjunction of those two facts amounts to a claim of selective prosecution, they would provide a defense available to virtually any target of a grand jury inquiry.

3. Petitioner's final contention (Pet. 25-28) is that if the district court and the court of appeals were correct in holding that he waived his claim of selective prosecution, then his lawyer's failure to assert that claim in advance of trial amounted to ineffective assistance of counsel. Petitioner also raises a host of other objections concerning his representation at trial (Pet. 7, 9, 28).

It is obvious, in light of what we have said in point 2, *supra*, that failure to assert petitioner's selective prosecution claim can hardly amount to ineffective assistance of counsel. Petitioner would not have been entitled to a hearing even if his counsel had filed a motion prior to trial. See

United States v. *Maruska*, 717 F.2d 1222, 1223 (8th Cir. 1983); *United States* v. *Whitley*, 670 F.2d 617, 621 (5th Cir. 1982); *Harshaw* v. *United States*, 542 F.2d 455, 457 (8th Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331 (2d Cir. 1974); *United States* v. *Hines*, 470 F.2d 225, 230-231 (3d Cir. 1972) ("Effective assistance does not demand that every possible motion be filed, but only those having a solid foundation."). And failure to take the other steps to which petitioner vaguely alludes provides no stronger support for this ineffective assistance claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12